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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 GERARDO MONTES,

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12 Petitioner,

13 v.

14 JEFF MACOMBER, Warden,

15 Respondent.
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Case No.: 15-cv-2377-H-BGS

ORDER:

**(1) DENYING PETITION FOR WRIT
OF HABEAS CORPUS;**

**(2) ADOPTING REPORT AND
RECOMMENDATION; AND**

**(3) DENYING CERTIFICATE OF
APPEALABILITY**

20 On October 19, 2015, Petitioner Gerardo Montes, a state prisoner, filed a petition for
21 writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his state court conviction
22 for first degree murder. (Doc. No. 1.) On December 23, 2015, Respondent Jeff Macomber
23 filed a response to the petition. (Doc. No. 5.) On March 15, 2016, Petitioner filed a traverse.
24 (Doc. No. 11.) On September 19, 2016, the magistrate judge issued a report and
25 recommendation, recommending that the Court deny the petition for writ of habeas corpus.
26 (Doc. No. 12.) On October 30, 2016, Petitioner filed objections to the magistrate judge's
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1 report and recommendation. (Doc. No. 16.) After careful consideration, the Court denies
2 the petition for writ of habeas corpus, adopts the magistrate judge's report and
3 recommendation, and denies a certificate of appealability.

4 **Background**

5 **I. Factual History**

6 The Court takes the following facts from the California Court of Appeal's opinion
7 in Petitioner's direct appeal:¹

8 In the morning of August 29, 2010, a dove hunter scouting locations for
9 the upcoming season discovered the body of 25-year-old Adrian Chee in an
10 agricultural field near Winterhaven, California. Chee had been shot twice,
11 once in the chest and once in the chin. The chest wound was fatal and caused
12 Chee's death. Tire tracks were observed in the area surrounding the body, and
13 Chee's leg appeared to have been run over. A vehicle also appeared to have
damaged a nearby concrete canal wall. Near Chee's body, sheriff's
department investigators found an open pack of Marlboro Red cigarettes.

14 Investigators also found a used Marlboro Red cigarette butt between
15 Chee's legs. The cigarette butt contained DNA from at least two male
16 contributors. After testing, Montes could not be eliminated as a contributor to
17 the DNA found on the cigarette butt. Such a situation would be expected to
18 occur at random in 1 in 2.1 billion African Americans, 1 in 75 million
Caucasians, and 1 in 46 million Hispanics.

19 A witness living near the field in Winterhaven reported hearing a
20 gunshot two nights prior to the discovery of Chee's body. Earlier on the night
21 of the gunshot, Montes's house in Yuma, Arizona, was burglarized. Montes's
22 wife, Sonia, called police and reported the burglary. When officers arrived,
23 the door to Montes's house had been forced open and the interior was
ransacked. The officers spoke with Montes's wife; Montes himself was not
24 present. Electronics, jewelry, and some amount of cash had been stolen.
Montes's wife later provided an itemized list to police for insurance purposes.

25 Montes had been in prison with a man named Ernesto Valera, and after

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27 ¹ Lodg. No. 5. The Court gives deference to state court findings of fact and presumes them to be correct.

1 prison they remained friends. According to Valera, Montes called him on the
2 night of the burglary. Valera asked Montes for some drugs, and Montes said
3 he could get methamphetamine. A few hours later, Montes picked up Valera
4 at Valera's house. Adrian Chee was with Montes in his Cadillac when Montes
5 arrived at Valera's. Montes, Chee, and Valera bought some methamphetamine
6 and proceeded to get high. They then drove in Montes's Cadillac to Paradise
7 Casino in Winterhaven to meet Valera's girlfriend, Melissa Barraza. Barraza
8 had additional methamphetamine, but the men had broken the pipe they used
9 to smoke methamphetamines earlier. Montes, Chee, and Valera, along with
10 Barraza, went to the house of Shavon Mendez, also in Winterhaven, to get
11 another pipe. Mendez confirmed to investigators that Montes had been at her
12 house that night between 2:00 a.m. and 5:00 a.m., but at trial she testified she
13 was at her mother's house all weekend and did not see Montes.

14 After leaving Mendez's house, Montes asked Valera to drive and
15 directed him to a nearby agricultural field. After they parked, Montes accused
16 Chee of burglarizing his house and wearing his watch. They stepped out of
17 Montes's car and began to argue. Valera got out as well, but Barraza remained
18 in the car. Montes pulled out a gun and aimed it at Chee. Chee said that he
19 was not scared and that Montes would not shoot him. Montes fired, first at
20 Chee's chest and then, as Chee was falling, at Chee's face. After Chee fell,
21 Montes knelt down and took the watch from Chee's wrist.

22 Montes told Valera to get back in the car. Valera got in the driver's seat,
23 and Montes got in the back seat. Valera backed up, ran over Chee, and hit a
24 concrete irrigation canal. Montes angrily told Valera that he would drive.
25 Montes then drove to Barraza's house, and the group used methamphetamines
26 again. Montes changed into clothes provided by Barraza, and Valera and
27 Montes buried the gun in Barraza's backyard. Montes called his wife, and she
28 came to Barraza's house. Montes told her what happened. Eventually they
drove away, with Montes driving his Cadillac and his wife in a pickup truck.

The following day, Valera and Montes removed the tires from Montes's
Cadillac and replaced them with used tires. Valera and Montes went to a local
Walmart to look for tires, where they were captured on security cameras.
Montes gave the old tires to Barraza to settle a drug-related debt. Barraza was
later arrested on drug charges after trying to sell the tires to an undercover
police officer. When questioned by investigators, Barraza recounted events of
the evening, including that Montes had shot Chee. She said she did not report

1 the murder because Montes had threatened her and she was afraid.

2 Valera and Montes eventually retrieved the gun from Barraza's
3 backyard, and Valera broke it into pieces. Valera and Montes contacted two
4 cousins, Delia Hayes and Meredith Barley, and offered them drugs to take the
5 gun to Mexico and throw it away. Barley agreed and attempted to drive
6 Montes's Cadillac across the border with the gun. Valera and Montes
7 followed her in a separate car. Valera and Montes were going to Mexico to
8 escape the country. Barley was turned back at the border because the Cadillac
9 had only temporary "paper" license plates. After exiting the other car, Montes
10 and Valera made it to Montes's brother's house in San Luis, Mexico on foot.

11 Valera left the house at some point, and Montes's wife later convinced
12 Montes to return home to Arizona. Valera, Hayes, and Barley eventually
13 disposed of the gun in a ditch on the U.S. side of the border. When
14 investigators recovered the gun, they found two long black hairs on the handle,
15 but no useful forensic testing could be performed on the gun or the hairs. With
16 information about his involvement, investigators interviewed Montes for
17 approximately two hours. Montes confirmed that the Cadillac was his car and
18 that no one other than he and his wife drove it. Montes denied knowing anyone
19 in Winterhaven, and he said he had only been there in the morning to look for
20 automotive parts at a junkyard. Montes was evasive when asked whether he
21 knew Valera or Chee, but Montes eventually acknowledged that Chee looked
22 familiar and that he knew Valera. Montes was also evasive when he was asked
23 if he was at Paradise Casino at Winterhaven on the weekend of the murder.
24 He initially said no, but then claimed he could have been there but been passed
25 out. He reported drinking heavily. Montes denied that Chee had ever been in
26 his car or that he was involved in Chee's murder.

27 Montes was arrested and charged, along with Valera, with Chee's
28 murder. Barraza was charged with being an accessory after the fact. Valera
later reached a cooperation agreement with the prosecution.

Valera agreed to testify at trial against Montes and plead guilty to being
an accessory. The prosecution agreed to dismiss the murder charge against
Valera. Barraza pled guilty to her accessory charge. At Montes's trial, the
prosecution called Valera and Barraza, among other witnesses. While Valera
provided substantive testimony in accordance with his cooperation agreement,
Barraza claimed not to remember the events surrounding Chee's murder. She

1 was therefore impeached with her prior statements to investigators. Following
2 Barraza's testimony, the prosecution uncovered a recorded telephone call
3 between Montes, who was in custody, and an unknown female caller. The
4 caller said she was in Salinas, California, and the conversation concerned a
5 female witness who was being forced to come to testify at Montes's trial.
6 Montes told the caller to tell the witness not to say anything. At the time of
trial, Barraza lived in Salinas and was compelled to attend. Montes's defense
at trial argued that Valera had murdered Chee.

7 Montes's wife, Sonia, testified that Montes was with her the night of
8 Chee's shooting. She previously told investigators that she had some doubt as
9 to where Montes was that night; he sometimes left during the middle of the
10 night while she slept. She said she knew Chee, but she did not suspect Chee
11 of burglarizing their house. She said that none of Montes's watches had been
12 stolen and that she did not list any watches on the list of stolen items she
13 submitted to police. She confirmed that Montes smoked Marlboro Red
cigarettes, the brand found at the scene of Chee's murder. An accident
reconstruction expert also testified that Montes's Cadillac could not have
made the tire tracks found at the scene of the murder. Montes did not testify.

14 **II. Procedural History**

15 On September 13, 2012, a jury convicted Petitioner of first degree murder in
16 violation of California Penal Code § 187(a), and returned a true finding on the allegation
17 that he personally used a firearm within the meaning of California Penal Code
18 § 12022.53(b)-(d). (Lodg. No. 2-29 at RT 2318-19.) The trial court sentenced Petitioner to
19 fifty years to life. (Lodg. No. 2-31 at RT 2462-63.)

20 Petitioner appealed his conviction, arguing that: (1) the trial court failed to give
21 complete accomplice instructions; (2) the evidence was insufficient to corroborate
22 accomplice testimony in support of his conviction for murder; (3) the trial counsel was
23 ineffective for failing to request accomplice or other limiting instructions and failing to
24 object to improper opinion testimony; (4) the cumulative effect of these errors requires
25 reversal; and (5) the trial court erred in denying his motion for a new trial based upon juror
26 misconduct and in failing to hold an evidentiary hearing. (Lodg. No. 3.) On April 8, 2014,

1 the California Court of Appeal affirmed the convictions. (Lodg. No. 5.) Petitioner then
2 filed for a petition for review in the California Supreme Court raising the same claims.
3 (Lodg. No. 6.) On July 23, 2014, the California Supreme Court summarily denied the
4 petition. (Lodg. No. 7.) Petitioner did not file a state petition for writ of habeas corpus.

5 On October 19, 2015, Petitioner filed a federal habeas petition, pursuant to 28 U.S.C.
6 § 2254. (Doc. No. 1.) Petitioner alleges violations of his constitutional rights on the same
7 five grounds as raised in his direct appeal. (Doc. No. 1 at 13-19.) On December 23, 2015,
8 Respondent filed a response to the petition. (Doc. No. 5.) On March 15, 2016, Petitioner
9 filed a traverse. (Doc. No. 11.) On September 19, 2016, the magistrate judge issued a report
10 and recommendation recommending that the Court deny the petition. (Doc. No. 12.)
11 Petitioner filed an objection to the report and recommendation on October 30, 2016. (Doc.
12 No. 16.)

13 Discussion

14 **I. Legal Standards**

15 A federal court may review a petition for writ of habeas corpus by a person in
16 custody pursuant to a state court judgment “only on the ground that he is in custody in
17 violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a);
18 accord Williams v. Taylor, 529 U.S. 362, 375 n.7 (2000). Habeas corpus is an
19 “extraordinary remedy” available only to those “persons whom society has grievously
20 wronged.” Juan H. v. Allen, 408 F.3d 1262, 1270 (9th Cir. 2005) (quoting Brecht v.
21 Abrahamson, 507 U.S. 619, 633-34 (1993)). Because Petitioner filed this petition after
22 April 24, 1996, the Anti-Terrorism and Effective Death Penalty Act of 1996 (“AEDPA”)
23 governs the petition. See Lindh v. Murphy, 521 U.S. 320, 327 (1997); Chein v. Shumsky,
24 373 F.3d 978, 983 (9th Cir. 2004). AEDPA creates a highly deferential standard toward
25 state court rulings. Woodford v. Viscotti, 537 U.S. 19, 24 (2002); see also Womack v. Del
26 Papa, 497 F.3d 998, 1001 (9th Cir. 2007) (citing Woodford, 537 U.S. at 24).

1 Federal habeas relief is available only if the result reached by the state court on the
2 merits is “contrary to,” or “an unreasonable application” of United States Supreme Court
3 precedent, or if the adjudication is “an unreasonable determination” based on the facts and
4 evidence. 28 U.S.C. §§ 2254(d)(1)-(d)(2). A federal court may grant habeas relief if a state
5 court either “applies a rule that contradicts the governing law set forth in [the United States
6 Supreme Court’s] cases” or “confronts a set of facts that are materially indistinguishable
7 from a decision of [the] Court and nevertheless arrives at a result different from [the
8 Court’s] precedent.” Early v. Packer, 537 U.S. 3, 8 (2002).

9 “[R]eview under 28 U.S.C. § 2254(d)(1) is limited to the record that was before the
10 state court that adjudicated the claim on the merits.” Cullen v. Pinholster, 563 U.S. 170,
11 181 (2011). In determining whether a state court decision is contrary to clearly established
12 federal law, the Court looks to the state court’s last reasoned decision. Avila v. Galaza, 297
13 F.3d 911, 918 (9th Cir. 2002). Where there is an unexplained decision from the state’s
14 highest court, the court “looks through” to the last reasoned state judgment and presumes
15 that the unexplained opinion rests upon the same ground. See, e.g., Brumfield, 135 S. Ct.
16 2269, 2276 (2015).

17 Even if a federal habeas petitioner has established that a constitutional error
18 occurred, the petitioner is not entitled to habeas relief based on a trial error unless the
19 petitioner can establish that the error “resulted in ‘actual prejudice.’” Brecht v.
20 Abrahamson, 507 U.S. 619, 637 (1993); accord Ayala, 135 S. Ct. 2187, 2197 (2015).
21 “Under that standard, an error is harmless unless it had substantial and injurious effect or
22 influence in determining the jury’s verdict.” Fry v. Pliler, 551 U.S. 112, 116 (2007)
23 (internal quotation marks and citation omitted). Further, “[t]here must be more than a
24 ‘reasonable possibility’ that the error was harmful.” Ayala, 135 S. Ct. at 2198.

25 A district court “may accept, reject, or modify, in whole or in part, the findings or
26 recommendations made by the magistrate.” 28 U.S.C. § 636(b)(1). If a party objects to any
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portion of the magistrate’s report, the district court reviews de novo those portions of the report. Id.

II. Analysis

A. Instructional Error Claim

Petitioner alleges that the trial court failed to give complete accomplice instructions, violating Petitioner’s due process rights. (Doc. No. 1 at 13-14.) Petitioner contends that the trial court erred in not providing the jury with the CALCRIM 344 instruction that Barraza could be found to be an accomplice and that her testimony might therefore require corroboration. Petitioner further argues that CALCRIM 301 should have been modified to reflect that such corroboration may be necessary.

“[F]ederal habeas corpus relief does not lie for errors of state law.” Estelle v. McGuire, 502 U.S. 62, 67 (1991) (internal quotation marks omitted). Therefore, claims of error concerning state jury instructions are generally not cognizable on federal habeas review. See Gilmore v. Taylor, 508 U.S. 333, 343 (1993); see also Menendez v. Terhune, 422 F.3d 1012, 1029 (9th Cir. 2005) (“Any error in the state court’s determination of whether state law allowed for an instruction . . . cannot form the basis for federal habeas relief.”). But federal habeas relief is available for a claim based on instructional error when a petitioner demonstrates that “[an] ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.” Estelle, 502 U.S. at 72. In determining whether a due process violation occurred, the court must examine the misconduct in the context of the entire proceedings. See Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). Moreover, under AEDPA’s highly deferential view, a federal habeas court may not grant habeas relief unless the state court’s harmless error determination is so unreasonable that no fair minded jurist could agree with it. See Davis v. Ayala, 135 S. Ct. 2187, 2199 (2015).

Here, the trial court did not violate due process. The Court of Appeal concluded that

1 the trial court “had no *sua sponte* duty to provide an accomplice instruction regarding
2 Barraza.” (Lodg. No. 5 at 8.) The Court of Appeal explained that “Barraza was an accessory
3 to Chee’s murder, not an accomplice” because “(1) Barraza was present with Montes,
4 Valera, and Chee before Chee was shot; (2) Barraza witnessed Chee’s shooting; and (3)
5 Barraza aided Montes and Valera after the shooting by providing Montes with fresh
6 clothes, allowing Valera to bury the gun in her backyard, and helping dispose of the tires
7 on Montes’s Cadillac.” (*Id.* at 8-9.) The Court of Appeal found that there was no evidence
8 that Barraza was aware of a plan to kill Chee, that Barraza agreed before the murder to
9 assist Montes or Valera in disposing of the gun, or that Barraza consciously failed to warn
10 Chee of a plan to murder him. (*Id.* at 9.) (citing *People v. DeJesus*, 38 Cal. App. 4th 1, 24
11 (1995)). This Court agrees with the Court of Appeal. Under AEDPA’s deferential standard,
12 the trial court’s instruction had a legitimate basis and did not violate due process.

13 Even if failing to provide an accomplice instruction regarding Barraza was an error,
14 the Court of Appeal found that this error was harmless because there was sufficient
15 independent evidence to corroborate Barraza’s statements. (*Id.* at 10.) This evidence
16 included the following: (1) Shavon Mendez confirmed to investigators that Montes was in
17 Winterhaven on the night of Chee’s murder, that Montes came to her house near the field
18 where Chee was eventually killed, and that Montes attempted to borrow a pipe to smoke
19 methamphetamines; (2) the cigarette butt found between Chee’s legs effectively matched
20 Montes’ DNA and placed Montes at the scene of Chee’s murder; (3) the damage to the
21 concrete canal wall near Chee’s body and the damage to the undercarriage of Montes’
22 Cadillac also placed Montes at the scene of Chee’s murder; and (4) testimony by Delia
23 Hayes established that Montes was involved in the exchange of drugs to help dispose of
24 the gun after the murder. (Lodg. No. 5 at 12.) Given this evidence, the Court of Appeal’s
25 determination of harmless error was not an unreasonable application of established federal
26 authority. The Court denies this claim of the petition.

1 **B. Insufficient Corroborating Evidence Claim**

2 Petitioner alleges that, as a matter of due process, the evidence was insufficient to
3 corroborate Valera and Barraza's accomplice testimony in support of his conviction for
4 murder. (Doc. No. 1 at 14-15.) The California Penal Code requires corroboration of
5 accomplice testimony. Cal. Penal Code § 1111. The Court of Appeal found that the
6 prosecution presented sufficient independent evidence to corroborate Valera and Barraza's
7 testimony. (Lodg. No. 5 at 12.)

8 "[I]t is not the province of a federal habeas court to reexamine state court
9 determinations on state law questions." Estelle v. McGuire, 502 U.S. 62, 67-68 (1991).
10 Federal habeas review of a state court's finding is limited to determining whether the
11 finding was "so arbitrary or capricious as to constitute an independent due process . . .
12 violation." Lewis v. Jeffers, 497 U.S. 764, 780 (1990).

13 The California Court of Appeal relied on four independent, non-accomplice sources
14 which sufficiently corroborated the accomplice testimony. These sources included the
15 following: (1) Shavon Mendez confirmed to investigators that Montes was in Winterhaven
16 on the night of Chee's murder, that Montes came to her house near the field where Chee
17 was eventually killed, and that Montes attempted to borrow a pipe to smoke
18 methamphetamines; (2) the cigarette butt found between Chee's legs effectively matched
19 Montes' DNA and placed Montes at the scene of Chee's murder; (3) the damage to the
20 concrete canal wall near Chee's body and the damage to the undercarriage of Montes'
21 Cadillac also placed Montes at the scene of Chee's murder; and (4) Delia Hayes testified
22 that Montes was involved in the exchange of drugs to help dispose of the gun after the
23 murder. (Id. at 12.)

24 These separate sources provided important details which tended to connect Montes
25 to the commission of the crime. The corroboration requirement of California Penal Code
26 § 1111 was met, and the application of state law was neither arbitrary nor capricious in this
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instance. Lewis, 497 U.S. at 780. Accordingly, the Court denies this claim of the petition.²

C. Ineffective Assistance of Counsel Claim

Petitioner alleges that he was provided with ineffective assistance of counsel in violation of the Sixth Amendment because counsel failed to: (1) request accomplice instructions regarding Barraza, (2) request a limiting instruction for Valera's guilty plea to his accessory charge, and (3) make an evidentiary objection concerning a sheriff's department investigator's testimony. (Doc. No. 1 at 15-16.) The Sixth Amendment entitles criminal defendants to the effective assistance of counsel at all critical stages of a criminal proceeding. Lafler v. Cooper, 566 U.S. 156, 164-166 (2012). In order to prove a Sixth Amendment ineffective assistance of counsel claim, the petitioner must establish (1) that counsel's performance was deficient, and (2) that he was prejudiced by counsel's deficient performance. Strickland v. Washington, 466 U.S. 668, 688, 692 (1984); Knowles v. Mirzayance, 556 U.S. 111, 122 (2009).

In order to satisfy the deficiency prong of the test, the petitioner must show his counsel's performance "fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688. "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Id. "Judicial scrutiny of counsel's performance must be highly deferential," and "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689; see also Padilla v. Kentucky, 559 U.S. 356, 371 (2010) ("Surmounting Strickland's high bar is never an easy task."). In order to satisfy the prejudice prong of the test, the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable

² Valera and Barraza were the only witnesses who connected Petitioner to the shooting. Both Valera and Barraza had criminal histories and suffered from drug addiction. (Doc. No. 1 at 14-15.) These issues create an additional reason to require corroboration. But the testimony was sufficiently corroborated; therefore, these issues do not raise a potential due process violation.

1 probability is a probability sufficient to undermine confidence in the outcome.” Strickland,
2 466 U.S. at 694.

3 In evaluating an ineffective assistance of counsel claim raised in a § 2254 habeas
4 petition, a federal habeas court “must take a ‘highly deferential’ look at counsel’s
5 performance through the ‘deferential lens of § 2254(d).’” Pinholster, 563 U.S. at 190
6 (citations omitted); see also Richter, 562 U.S. at 105 (“The standards created by Strickland
7 and § 2254(d) are both ‘highly deferential.’”). Thus, a federal habeas court’s review of an
8 ineffective assistance of counsel claim in a § 2254 habeas petition is “‘doubly deferential.’”
9 Pinholster, 563 U.S. at 190. The reviewing court must determine “whether there is any
10 reasonable argument that counsel satisfied Strickland’s deferential standard.” Richter, 562
11 U.S. at 105.

12 First, Petitioner claims that his counsel was ineffective because she failed to request
13 accomplice instructions regarding Barraza. But Petitioner has not shown prejudice,
14 particularly in light of the Court of Appeal’s conclusion that there was sufficient
15 independent evidence to corroborate Barraza’s statement. (Lodg. 5 at 10.) Furthermore,
16 this Court notes, as the Court of Appeal’s noted, that there was no evidence that Barraza
17 was aware of a plan to kill Chee, that Barraza agreed before the murder to assist Montes or
18 Valera in disposing of the gun and other evidence, or that Barraza consciously failed to
19 warn Chee of a plan to murder him. (Lodg. 5 at 9.) Based on this, there is no reasonable
20 possibility that the result of Petitioner’s trial would have been different had trial counsel
21 made a request for accomplice instructions. See Strickland, 466 U.S. at 694. Accordingly,
22 the Court denies this claim of the petition on this basis.

23 Second, Petitioner claims that his counsel was ineffective because she failed to
24 request a limiting instruction regarding the guilty pleas of Barraza and Valera. The Court
25 of Appeal determined that the guilty pleas were likely inconsequential given the substance
26 of the testimony regarding Montes’s role in the murder and their activities afterwards.

1 (Lodg. 5 at 14.) This Court agrees. Given the corroborating evidence and the substance of
2 the testimony, there is no reasonable possibility that the result of Petitioner's trial would
3 have been different had Petitioner's counsel requested the limiting instruction. See
4 Strickland, 466 U.S. at 694. Accordingly, the Court denies this claim of the petition on this
5 basis.

6 Third, Petitioner claims that his counsel was ineffective concerning an evidentiary
7 objection about a sheriff's department investigator's testimony. The Attorney General
8 acknowledged in the lower court proceedings that the investigator's comment on Mendez's
9 truthfulness was inadmissible. (Lodg. No. 5 at 15.) But the Court of Appeal held that
10 "defense counsel's failure to object is just the type of tactical decision that will rarely give
11 rise to reversible error." (Id.) (citing People v. Hart, 20 Cal. 4th 546, 623). The Court
12 agrees. Thus, Petitioner cannot establish that his attorney acted unreasonably in choosing
13 not to object. See Strickland, 466 U.S. at 689. Even if Petitioner's attorney should have
14 objected to the testimony, Petitioner has not shown that he was prejudiced by this failure.
15 The jury was already presented with the conflicting statements from Mendez and the
16 investigator. There was also other evidence in the record to support the jury's conclusion
17 regarding Petitioner's whereabouts that night. He has not shown that but for counsel's
18 failure to object, the result of the trial would have been different. See Strickland, 466 U.S.
19 at 694. Accordingly, the Court denies this claim of the petition on this basis.

20 **D. Cumulative Effect of the Errors Claim**

21 Petitioner alleges that the cumulative effect of several purported errors requires
22 reversal. (Doc. No. 1 at 16-17.) Petitioner claims that the trial court failed to give complete
23 accomplice instructions, that the evidence was insufficient to corroborate accomplice
24 testimony in support of his conviction of murder, and that his trial counsel was ineffective
25 for failing to request accomplice or other limiting instructions and failing to object to
26 improper opinion testimony. (Doc. No. 1 at 16-17.) The combined effect of multiple errors
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violates due process if it “renders the resulting trial fundamentally unfair.” Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007) (citing Chambers v. Mississippi, 410 U.S. 284, 298, 302-03 (1973)). Cumulative error warrants habeas relief only where the combined effect of the errors had a “substantial and injurious effect or influence on the jury’s verdict.” Parle, 505 F.3d at 927 (quoting Brecht v. Abrahamson, 507 U.S. 619, 637 (1993)).

The Court concludes that these purported errors did not have a “substantial and injurious effect or influence on the jury’s verdict.” See Parle, 505 F.3d at 927. The evidence at trial included: (1) Shavon Mendez confirmed to investigators that Montes was in Winterhaven on the night of Chee’s murder, that Montes came to her house near the field where Chee was eventually killed, and that Montes attempted to borrow a pipe to smoke methamphetamines; (2) the cigarette butt found between Chee’s legs effectively matched Montes’ DNA and placed Montes at the scene of Chee’s murder; (3) the damage to the concrete canal wall near Chee’s body and the damage to the undercarriage of Montes’ Cadillac also placed Montes at the scene of Chee’s murder; and (4) Delia Hayes testified that Montes was involved in the exchange of drugs to help dispose of the gun after the murder. (Lodg. No. 5 at 12.) This evidence corroborates Valera’s testimony, and connects Montez to the murder. As a result, the purported errors could not have substantially affected the jury’s verdict given the weight of the accumulated evidence. Accordingly, the Court denies this claim of the petition.

E. Juror Misconduct

Petitioner alleges that a juror misconduct issue violated his rights to a fair trial and due process. (Doc. No. 1 at 17-19.) Jurors purportedly discussed in deliberation the fact that Petitioner did not testify. (Lodg. No. 5 at 16.) The Sixth Amendment’s guarantee of a trial by jury requires that the jury base its verdict on the evidence presented at trial. Turner v. Louisiana, 379 U.S. 466, 472-73 (1965). A jury’s exposure to extrinsic evidence deprives a defendant of the rights to confrontation, cross-examination, and assistance of counsel

embodied in the Sixth Amendment. Lawson v. Borg, 60 F.3d 608, 612 (9th Cir.1995). “Evidence not presented at trial, acquired through out-of-court experiments or otherwise, is deemed ‘extrinsic.’” United States v. Navarro-Garcia, 926 F.2d 818, 821 (9th Cir.1991).

Petitioner’s decision not to testify is not extrinsic evidence. Raley v. Ylst, 470 F.3d 792, 803 (9th Cir. 2006) (affirming denial of petition for habeas corpus where jurors considered petitioner’s decision not to testify in his own defense). Although the jury’s discussion of this issue violated the trial court’s instructions, what happened in the courtroom was a part of the trial, not extrinsic to it. Generally, the Court may not inquire into a jury’s deliberations concerning the evidence at trial. Belmontes v. Brown, 414 F.3d 1094, 1124 (9th Cir. 2005), rev’d on other grounds; Ayers v. Belmontes, 549 U.S. 7 (2006). Furthermore, “intrinsic jury processes will not be examined on appeal and cannot support reversal.”³ United States v. Bagnariol, 665 F.2d 877, 887 (9th Cir. 1981).

Additionally, the Court of Appeal concluded that any potential misconduct in discussing the fact that Petitioner did not testify was harmless. “Any discussion of [Petitioner’s] failure to testify was brief, isolated, and promptly cut off by reference to the court’s jury instructions precluding such discussions.” (See Lodg. No. 5 at 20.) The jury foreman and other jurors reminded the jury that they should not consider this fact in their deliberations. (Id.) This Court agrees. The Court of Appeal’s determination of harmless error was not an unreasonable application of established federal authority.

Petitioner also alleges that the trial court violated his right to due process because it failed to conduct a full hearing on the jury misconduct issue. However, due process does not require a hearing any time evidence of possible juror bias is brought to light. Sims v. Rowland, 414 F.3d 1148, 1155 (9th Cir. 2005) (citing Tracey v. Palmateer, 341 F.3d 1037,

³ The trial court can consider evidence of a juror’s statement and any resulting denial of the jury trial guarantee where a juror makes a clear statement indicating that racial stereotypes or animus were a significant motivating factor in the juror’s vote to convict. Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 869 (2017).

1 1044 (9th Cir. 2003)). The record of the hearing on defense counsel's motion for a new
2 trial indicates that the trial court carefully considered the impact of the juror misconduct.
3 The trial court reviewed detailed declarations from each of the jurors on Petitioner's trial
4 that both parties submitted. Accordingly, it was not an unreasonable application of
5 established federal authority for the Court of Appeal to affirm the trial court's decision to
6 deny an evidentiary hearing.

7 **VII. Certificate of Appealability**


8 A certificate of appealability may issue only if the defendant "has made a substantial
9 showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a district
10 court has denied the petitioner's constitutional claims on the merits, a defendant satisfies
11 the above requirement by demonstrating "that reasonable jurists would find the district
12 court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel,
13 529 U.S. 473, 484 (2000). The Court concludes that reasonable jurists would not find the
14 Court's assessment of Defendant's claims debatable or wrong. Accordingly, the Court
15 declines to issue a certificate of appealability.

16 **Conclusion**

17 For the reasons stated, the Court denies Petitioner's § 2254 petition for habeas corpus
18 and adopts the magistrate judge's report and recommendation. (Doc. Nos. 1, 12.)
19 Additionally, the Court denies Petitioner a certificate of appealability.

20 **IT IS SO ORDERED.**

21 DATED: April 10, 2017

22 
23 MARILYN L. HUFF, District Judge
24 UNITED STATES DISTRICT COURT
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